

A **VYISHNU JEROME RAVEENDEREN v. PERBADANAN
PENGURUSAN TWIN TOWERS & ANOTHER CASE**

 HIGH COURT MALAYA, GEORGETOWN
 LIM CHONG FONG J
B [CIVIL APPEALS NO: PA-12B-48-10-2017 & PA-12B-50-10-2017]
 19 APRIL 2018

C ***TORT:** Negligence – Liability – Appeal – Claimant fell and smashed against glass wall of games room of condominium and suffered various injuries – Claim against management corporation of condominium for negligence and failure to ensure games room was safe for usage – Whether management corporation liable – Whether management corporation took necessary steps to ensure safety of games room – Whether there was contributory negligence by claimant – Whether claimant failed to observe management corporation’s house rules – Whether claimant bound by management corporation’s house rules*

D ***TORT:** Negligence – Damages – Claim for general and special damages – Appeal – Claimant fell and smashed against glass wall of games room of condominium and suffered various injuries – Claim against management corporation of condominium for negligence and failure to ensure games room was safe for usage – Whether claims backed by supporting documents – Whether Sessions Court awarded fair and appropriate sum to claimant*

E

F The appellant (‘the plaintiff’) played table tennis, as a guest, at the games room of the condominium (‘the premises’) managed by the respondent (‘the defendant’). During the game, the plaintiff’s right foot caught in the carpet, causing him to fall and smash against the glass wall of the games room. The plaintiff suffered various injuries including lacerations on his left leg, index finger, right wrist and right foot with completely cut achilles tendon on the same foot. He had to undergo specialist treatment and, following that, physiotherapy sessions for five months. The plaintiff commenced an action against the defendant, at the Sessions Court, on the grounds of negligence and failure, under common law, to ensure that the games room at the premises was safe for usage by occupiers. The plaintiff also relied on the doctrine of *res ipsa loquitur*. In support of his claim, the plaintiff submitted that (i) as the floor of the games room was uneven and parts of the carpet were torn, the feet of a person using the games room would be susceptible to getting caught in the carpet; and (ii) the glass wall of the games room was not constructed with tempered glass, which would not shatter upon impact. The Sessions Court Judge (‘the SCJ’) found the defendant liable for the sum of RM31,000 for general damages and RM2,843 for special damages. Hence, the present appeals by the parties. The plaintiff appealed against the damages awarded (‘the first appeal’) on the grounds that the SCJ (i) failed to consider the plaintiff’s specialist medical report and consequently, the SCJ failed to make an award for the disabilities sustained by the plaintiff and the expenses incurred for physiotherapy sessions

G

H

I

required; and (ii) erroneously awarded only 1/3 of the RM8,500 medical expenses incurred by the plaintiff for treatment at the Penang Adventist Hospital ('the PAH'). The defendant appealed against the liability ('the second appeal') on the grounds that (i) the SCJ erred when he (a) relied on the testimony of the plaintiff's witnesses *in lieu* of the contemporaneous document adduced; (b) held what was not the plaintiff's pleaded case by holding that the defendant breached its statutory duty even though the plaintiff pleaded breach of duty of care under common law; (c) failed to account for laches on the part of the plaintiff for not having timeously initiated the suit; and (d) failed to consider the contributory negligence on the part of the plaintiff; and (ii) the plaintiff failed to observe the defendant's house rules, as found in the agreement between the developer of the premises and every purchaser, which stated that occupants and guests shall use the common facilities at their own risk and the respondent shall not be responsible for any injury sustained.

Held (allowing first appeal; dismissing second appeal):

- (1) The specialist medical report was an updated report of the plaintiff's physical condition since the accident. This report also referred to the relevant medical history of the plaintiff that included the contemporaneous medical report. The updated medical report was cogent to illustrate the consequence of the plaintiff's disabilities and suffering consequential to the accident in the medium and long term. This could not be ascertained from the initial contemporaneous medical report. There was misapprehension and lack of judicial appreciation of evidence by the SCJ in discarding the updated medical report whilst awarding general damages for the plaintiff's achilles tendon cut. The plaintiff's claim for RM6,000 for physiotherapy was a claim which was special damages in nature and must be backed by receipts of the actual expenses incurred unless otherwise satisfactorily explained on why they were not produced. In their absence, this claim could not be allowed. (paras 32, 33 & 37)
- (2) In his grounds of judgment, the SCJ did not state why he considered it was unreasonable for the plaintiff to have sought treatment at the PAH. In the circumstances that then prevailed where the plaintiff was bleeding profusely from a deep wound, as well as considering the explanation given by his mother that it was urgent to get the plaintiff for treatment soonest, it was reasonable that the plaintiff was sent to the PAH. The plaintiff ought to be fully reimbursed the medical expenses incurred. The SCJ fell into error by awarding only a third of it. (para 41)

- A (3) The SCJ's award of (i) general damages for the achilles tendon cut of RM15,000 was substituted with RM45,000; and (ii) special damages for private medical costs of RM2,333 was substituted with RM8,000. The other awards by the SCJ remained unaltered. (para 42)
- B (4) The SCJ rightly placed the appropriate weight on the evidence adduced before him. Based on the quality of the documentary adduced, the SCJ did not err when he placed preference on the testimony of the witnesses who saw both the accident and the then existing physical condition of the floor and carpet in the games room. Since the plaintiff relied on the maxim *res ipsa loquitur*, the onus of proof shifted to the defendant to disprove negligence. In the circumstances, the best evidence would have been to adduce the contemporaneous photographic evidence of the conditions of the carpet and the floor at the games room. However, the defendant failed to do so. (para 17)
- C
- D (5) The SCJ's judgment must be read in its proper context. The SCJ merely acknowledged that the defendant had the statutory duty to manage the premises, as admitted, which was rightly so as all management corporations are statutorily required to manage the built condominium apartments. As to the finding of breach on the part of the defendant, the SCJ was alluding to the common law duty of care in his three-fold analysis on liability. The defendant's argument was misconceived and the SCJ did not commit any appealable error. If the SCJ had instead found liability based on breach of statutory duty, he would have quoted the appropriate section(s) of the Strata Titles Act 1985 ('the Act'). (para 20)
- E
- F (6) The application of laches is fact-sensitive dependent upon the unique facts and circumstances of each case. The plaintiff was not lackadaisical or indolent in initiating the suit due to the personal and financial circumstances of his mother. The plaintiff's mother explained that she (i) was a single parent; (ii) suffered some medical setbacks that put her into further financial difficulty for a while; and (iii) had to look for a suitable lawyer to pursue the plaintiff's claim. The mother's explanation was reasonable. (paras 22 & 23)
- G
- H (7) Contributory negligence, as alleged by the defendant, was rightly discarded because it was not pleaded by the defendant in its defence. (para 27)
- I (8) The house rules were not binding on the plaintiff as (i) the agreement adduced in evidence was not an executed copy; (ii) there was no proof of any assignment of the agreement by the developer to the defendant; (iii) the house rules would have been invalidated and replaced by the statutory house rules found in the Schedule of the Act when the defendant was established. (para 26)

Case(s) referred to:

Adrian Yeoh Roslan & 2 Ors v. Sin Hock Soon Transport Sdn Bhd & Anor [2010] 2 PIR [53] (*refd*)

Amal Bakti Sdn Bhd & Ors v. Affin Merchant Bank (M) Bhd [2012] 4 CLJ 813 CA (*refd*)

Chai Yee Chong v. Lew Thai [2004] 2 CLJ 321 CA (*refd*)

Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd & Ors [2012] 1 LNS 416 HC (*refd*)

Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors [2000] 4 CLJ 324 CA (*refd*)

Gunalan Chandakesan & Anor v. Tamil Arasu Velu [2014] 1 LNS 928 HC (*refd*)

Jasi Alam v. Nohya Mustar & Anor [1974] 1 LNS 56 HC (*dist*)

Lai Hee Sang v. Pun Hai Chin [2016] 1 LNS 1622 CA (*refd*)

Lim Ker v. Chew Seok Tee [1967] 1 LNS 88 FC (*refd*)

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC (*refd*)

Seah Yit Chen v. Singapore Bus Service (1978) Ltd & Ors [1990] 1 LNS 56 HC (*refd*)

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 1 LNS 119 FC (*refd*)

UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor [2010] 9 CLJ 785 FC (*refd*)

United Plywood and Sawmill Ltd v. Lock Ngan Loi [1970] 1 LNS 164 FC (*refd*)

Usima Sdn Bhd v. Lee Hor Fong [2017] 9 CLJ 646 FC (*refd*)

Yang Salbiah & Anor v. Jamil Harun [1981] 1 LNS 106 FC (*refd*)

(Civil Appeal No: PA-12B-48-10-2017)

For the appellant - Khaw Veon Szu & Chang Mooi Yim; M/s Veon Szu & Kok Thye

For the respondent - Rajivan Nambiar; M/s Reza Rahim & Rajivan

(Civil Appeal No: PA-12B-50-10-2017)

For the appellant - Rajivan Nambiar; M/s Reza Rahim & Rajivan

For the respondent - Khaw Veon Szu & Chang Mooi Yim; M/s Veon Szu & Kok Thye

Reported by Najib Tamby

JUDGMENT**Lim Chong Fong J:****Introduction**

[1] These are appeals that emanated from the plaintiff and defendant respectively against the trial decision of the Sessions Court in relation to an accident that arose whilst playing in the games room of a condominium.

[2] The appellant in Civil Appeal No PA-12B-48-10-2017 (“first appeal”) and respondent in Civil Appeal No. PA-12B-50-10-2017 (“second appeal”) is an individual and the plaintiff in Georgetown Sessions Court Suit No. PA-A53-2-05-2016 (“suit”).

[3] The respondent in the first appeal and the appellant in the second appeal is the management corporation of the Twin Towers Condominium (“premises”) incorporated pursuant to the Strata Titles Act 1985 and the defendant in the suit.

- A [4] For convenience, I will address the parties here according to how they were designated in the suit.

Brief Facts

- B [5] On 30 May 2010, the plaintiff as guest of his cousin played table tennis together in the games room of the premises.

[6] In the course of so playing, the plaintiff's right foot was caught in the carpet. As the result, he fell and smashed against the glass wall of the games room that shattered ("accident").

- C [7] According to the plaintiff, the floor of the games room was uneven. In addition, parts of the carpet thereon were torn. Consequently, the feet of persons using the games room would be susceptible of being caught in the carpet. That notwithstanding, the glass wall of the games room wasn't also constructed in tempered glass which would not shatter upon impact.

- D [8] Consequently, the plaintiff suffered various injuries including lacerations on his left leg, index finger, right wrist and right foot with completely cut achilles tendon on that foot. He was forthwith sent to the Penang Adventist Hospital for specialist treatment and thereafter physiotherapy sessions for five months.

- E [9] The plaintiff filed the suit against the defendant on 31 May 2016 alleging negligence on the part of the defendant in failing in its common law duty to ensure that the games room in the premises is safe for usage by occupiers. The plaintiff also relied on the doctrine of *res ipsa loquitor*.

- F [10] After trial, the Sessions Court Judge found the defendant liable for the sum of RM31,000 for general damages with interest thereon at 5% per annum from the date of the service of the writ till date of judgment, the sum of RM2,843 for special damages with interest thereon at 2.5% per annum from the date of the service of the writ till date of judgment, interest on the judgment sum at 5% per annum from the date of judgment till full realisation and costs of RM7,000.

[11] The plaintiff is dissatisfied with the damages awarded and thus filed the first appeal and the defendant is dissatisfied with the liability as found and thus filed the second appeal.

- H [12] Both appeals came before me and after having read the record of appeal and written submissions, I heard oral arguments of counsel on 13 February 2018 and 13 March 2018. Both appeals were heard concurrently. I thereafter adjourned my decision for deliberation of the arguments advanced by counsel.

I

[13] Now having duly done so, I furnish my decision below for both the first appeal and the second appeal together with the supporting grounds.

Contentions And Findings

[14] It is appropriate that the appeals are determined in the reverse order. I will thus first deal with the second appeal on liability followed by the first appeal on the amount awarded. The governing principles for both appeals are set out in the recent Federal Court cases of *UEM Group Bhd v. Genisys Integrated Engineers Pte Ltd & Anor* [2010] 9 CLJ 785 and *Usima Sdn Bhd v. Lee Hor Fong* [2017] 9 CLJ 646. In the latter case, Balia Yusof Wahi FCJ held as follows:

[47] ... No doubt an appellate court will be slow in interfering or disturbing a finding of fact recorded by a trial court but it does not end there. In *State of Rajasthan v. Hanuman* AIR [2001] SC 282, Mohapatra J delivering the judgment of the Supreme Court of India said:

An appellate Court should assess the evidence on record with a view to satisfy itself that the appreciation of evidence by the trial Court is not vitiated on account of any erroneous approach or illegality and it is not palpably erroneous. The sustainability of the judgment depends on the soundness of the reasons given in support of the findings and the conclusion.

[48] It is trite that appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. (See: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19, *Watt or Thomas v. Thomas* [1947] AC 484, *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32).

Second Appeal

[15] In respect of liability, the defendant in the second appeal in gist advanced five broad grounds in the memorandum of appeal but only focused on three grounds in the submissions. The defendant firstly argued that the learned Sessions Court Judge erred by having failed to appreciate and evaluate the evidence adduced by not placing weight on the loss adjustor's report. Instead, the learned Sessions Court Judge relied on the testimony of the plaintiff's witnesses *in lieu* of the contemporaneous document adduced (exh. D16). The defendant thus relied on the cases of *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 1 LNS 119; [1979] 2 MLJ 229, *Guan Teik Sdn Bhd v. Hj Mohd Noor Hj Yakob & Ors* [2000] 4 CLJ 324; [2000] 4 MLJ 433 and *Citibank Bhd v. Pembangunan Cahaya Tulin Sdn Bhd (Receivers and Managers appointed) & Ors and Other Suits* [2012] 1 LNS 416; [2012] 9 MLJ 181 to illustrate that the documentary evidence should prevail over oral testimony especially over an accident that occurred about six years before the trial.

[16] However, the plaintiff pointed out that exh. D16 relied upon by the defendant wasn't the loss adjustor's report but a letter by the defendant's insurer written to the plaintiff. As such, the plaintiff submitted that the

A learned Sessions Court Judge rightly brushed aside the document because that is documentary hearsay extracted from a secondary source. The primary source *to wit* the original loss adjustor's report as well as its maker was not called as witness at the trial.

B [17] In my opinion, the learned Sessions Court Judge had rightly placed the appropriate weight on the evidence adduced before him. Based on the quality of the documentary evidence produced by the defendant, I do not find that he erred by placing preference on the testimony of the witnesses who saw both the accident and the then existing physical condition of the floor and carpet in the games room of the premises. Moreover, since the plaintiff relied on the maxim of *res ipsa loquitur*, the onus of proof hence shifted to the defendant to disprove negligence. In the circumstances, the best evidence would have been to adduce the contemporaneous photographic evidence of the floor and carpet condition in the games room. The defendant failed to do so at the trial at its peril and I do not hence find any appealable error on the part of the learned Sessions Court Judge.

C [18] The defendant secondly argued the learned Sessions Court Judge held that the defendant breached its statutory duty whereas the plaintiff pleaded breach of common law duty of care in his pleading. Accordingly, the learned Sessions Court Judge erred by holding what wasn't the plaintiff's pleaded case.

E [19] It is pertinent in my view in this regard to examine what the learned Sessions Court Judge actually found in para. 7 of his grounds of judgment. He held as follows:

F [7] Hence, on this issue and in fact even the Defendant's witnesses Lim Kok Sniah ('SD1') has admitted that the defendant is under a statutory duty to properly managed the Condominium and its Common Facilities. I hold that the Defendant owes a duty of care toward the Plaintiff when he utilised the said games room on that material day.

G [20] In my opinion, the judgment must be read in its proper context. The learned Sessions Court Judge merely acknowledged that the defendant had the statutory duty to manage the premises as admitted, which is rightly so in my view as all management corporation are statutorily required to manage the built condominium apartments. However, as to his finding on breach on the part of the defendant, I find that he was alluding to the common law duty of care in his three-fold analysis of liability in paras. 5 to 24 of his grounds of judgment. If he had instead found liability based on breach of statutory duty, he would have quoted the appropriate sections(s) of the Strata Titles Act 1985. Consequently, I find that the learned Sessions Court Judge did not commit any appealable error here. The defendant's argument is in other words misconceived.

I

[21] Thirdly, the defendant argued that the learned Sessions Court Judge failed to account for laches on the part of the plaintiff by not having timeously initiated the suit. The defendant referred to the Court of Appeal case of *Lai Hee Sang v. Pun Hai Chin* [2016] 1 LNS 1622; [2016] 6 MLJ 434 where Zamani A Rahim JCA held as follows:

[40] The appellant's claim is therefore statute-barred by the provisions of the Limitation Act 1953. His claim is also defeated by the doctrine of laches and acquiescence. There is inordinate delay on the part of the appellant in prosecuting his claim for the equitable relief of specific performance against the respondent on the 14 May 2014, a delay of more than 18 years! The doctrine of laches and acquiescence is independent of the provisions of the Limitation Act. Section 32 of the Limitation Act 1953 expressly permits the court to apply the doctrine of laches and acquiescence to refuse the relief sought by the appellant: see *M Ratnavale v. S Lourdenadin* [1988] 2 MLJ 371.

[41] In *Panchanath a/l Ratnavale (suing as the beneficiary to the estate of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased under will dated 10 February 1971) v. Sandra Segara Mahalingam (sued as the executor and trustee of the last will of Ratnavale s/o Mahalingam @ Mahalingam Ratnavale deceased dated 10 February 1971) & Ors* [2012] 5 MLJ 109 at p. 121 para. 27, the court referred to *Halsbury's Laws of England* (3rd Ed) which states:

Laches is an equitable defence implying lapse of time and delay in prosecuting a claim. A court of equity refuses its aid to a stale demand where the plaintiff has slept upon his rights and acquiesced for a great length of time. He is then said to be barred by laches.

[42] Further, the Latin maxim *vigilantibus non dormientibus, jura subveniunt* (the court of equity has always refused its aid to stale demands, when a party has slept on his rights and acquiesced for a great length of time) applies. It is an established rule of equity that a plaintiff in equity is bound to prosecute his claim without undue delay. A court of equity would refuse its aid to stale demands i.e. where the plaintiff has slept upon his right and acquiesced for a great length of time. In *Teo Ah Bin @ Teo Eng Bin*, the court at p. 122 held, *inter alia*:

(5) ... The principle that delay defeats equities or equity aids the vigilant and not the indolent had to be applied vigorously against the plaintiff.

[22] The plaintiff in response contended that the suit was filed within the time prescribed by the Limitation Act 1953. As to the filing of the suit only in 2016 even though the accident occurred in 2010, the plaintiff's mother testified in re-examination that she had financial constraint at that period of time. She explained that she is a single parent and had suffered some medical setbacks that put her into further financial difficulty for a while. She also had to look for a suitable lawyer to pursue the plaintiff's claim.

A [23] The learned Sessions Court Judge discarded the defendant's defence of laches but he did not state his reason(s) for so doing in his grounds of judgment. That notwithstanding, I am of the view that the application of laches is fact sensitive dependent upon the unique facts and circumstances of each case. On the facts herein, I do not think that the plaintiff was
B lackadaisical or indolent in initiating the suit due to the personal and financial circumstances of his mother. The plaintiff's mother's explanation is to me reasonable. Thus there is again no appealable error here.

C [24] One of the grounds raised by the defendant in the memorandum of appeal but not focused upon in the submissions is the non observance of the house rules of the defendant as evidenced in the agreement between the developer of the premises and every purchaser. The defendant relied on s. 3.16(viii) of the agreement that provides as follows:

Occupants and Guests shall use the Common Facilities at their own risk. The Management shall not be responsible for the injury sustained by the
D Occupants or their Guests or for any loss or damage to their personal property.

E [25] The plaintiff in rebuttal responded that the aforesaid house rules are inapplicable. The learned Sessions Court Judge again discarded the defendant's argument without assigning any reason thereto in his grounds of judgment.

F [26] In my opinion, I find that the alleged house rules were not binding upon the plaintiff for several reasons. Firstly the agreement that was adduced in evidence is an unexecuted copy. Secondly, there is no proof of any assignment of the agreement by the developer to the defendant. Thirdly these alleged house rules would have been invalidated and replaced by the statutory house rules found in the Schedule to the Strata Titles Act 1985 when the defendant was established. In the premises, I find that there is no appealable error here too.

G [27] The other and final ground that was raised by the defendant is the failure of the learned Sessions Court Judge to consider contributory negligence on the part of the plaintiff. He did not consider it and nothing in this regard was stated in his grounds of judgment. Nonetheless the plaintiff submitted that contributory negligence as alleged by the defendant was rightly discarded because it wasn't pleaded by the defendant in its defence.

H [28] In the Court of Appeal case of *Amal Bakti Sdn Bhd & Ors v. Affin Merchant Bank (M) Bhd* [2012] 4 CLJ 813; [2012] 5 MLJ 61, Anantham Kasinather JCA held as follows:

I [34] We now propose to deal with three other matters raised by the learned trial judge although these matters were not pleaded by the respondent. The first is the defence of contributory negligence, the second being the effect in law of the judgment obtained by the SC against MASB and Kenneth Chow in the SC suit and that the agreements between the original purchasers of the shares and the appellants were champertous.

Our preliminary observation is that all three matters were not pleaded and consequently ought not to have been considered by His Lordship. In our judgment, His Lordship ought to have followed the pronouncements in the case of *Fookes v. Slaytor* [1979] 1 All ER 137; *Hamizan bin Abd Hamid v. Wong Kok Keong & Anor* [1994] 3 MLJ 630; *Anuar bin Mat Amin v. Abdullah bin Mohd Zain* [1989] 3 MLJ 313, and that failure to plead these defences was fatal ...

In the premises, I find there is also no appealable error here as well.

[29] Consequently, I find that the defendant does not have a meritorious appeal against the plaintiff in the second appeal.

First Appeal

[30] Moving on to the first appeal by the plaintiff on the award of damages, the plaintiff argued that the learned Sessions Court Judge did not consider the plaintiff's specialist medical report of Mr Mohana Rao of the Gleneagles Penang Hospital dated 9 May 2016. As the result, the learned Sessions Court Judge erred by failing to make an award to the plaintiff for disabilities sustained by the plaintiff and the expenses incurred for physiotherapy sessions required by him. As the result, the learned Sessions Court Judge only awarded RM15,000 for the plaintiff's achilles tendon cut on his right foot instead of RM55,000 as claimed.

[31] The defendant retorted that the learned Sessions Court Judge rightly refused to consider the aforesaid specialist medical report because it was produced six years after the accident. It is unsafe to rely on it in view of the long time gap following *Jasi Alam v. Nohya Mustar & Anor* [1974] 1 LNS 56; [1975] 1 MLJ 166.

[32] I have reviewed the specialist medical report dated 9 May 2016 and find that it is an updated report of the plaintiff's physical condition since the accident. This report also referred to the relevant medical history of the plaintiff that included the contemporaneous medical report of Dr Lou Kean Keong of the Penang Adventist Hospital dated 16 June 2010. In contrast with the medical report produced in *Jasi Alam v. Nohya Mustar & Anor* (*supra*) there is no additional injury detected in the plaintiff in this updated medical report. As also pointed out by plaintiff, the defendant did not challenge the contents of the report at the trial. The court did not require the attendance of the specialist too notwithstanding that the court is empowered to do so with the consent of the parties following *Lim Ker v. Chew Seok Tee* [1967] 1 LNS 88; [1967] 2 MLJ 253. In the premises, the contents are deemed accepted.

[33] I find that the updated medical report is cogent to illustrate the consequence of the plaintiff's disabilities and suffering consequential to the accident in the medium and long term. This could not be ascertained from the initial contemporaneous medical report. In the circumstances, it is

- A therefore my opinion that there was misapprehension as well as lack of
judicial appreciation of evidence on the part of the learned Sessions Court
Judge in discarding the updated medical report whilst awarding general
damages for the plaintiff's achilles tendon cut. It has been confirmed therein
that the plaintiff suffered consequential muscle atrophy, loss of dorsiflexion
B over the ankle joint and foot as well as loss of proprioception and peroneal
weakness. That apart, he also suffered 50% permanent loss of sensation over
his right sole and loss of muscle power that caused instability and loss of
balance. As the result, he has difficulty playing sports.

- C [34] The learned Sessions Court Judge discarded the aforesaid medical
specialist report because of laches as seen in paras. 30 to 36 of his grounds
of judgment. He seems to me to have equated the application of laches on
late prosecution of the claim with delayed conception of relevant evidence
for trial. With respect, I find that the learned Sessions Court Judge
misunderstood the principle of laches and fell into error here. This is
D sufficient to warrant appellate intervention. That notwithstanding and as
submitted by the plaintiff, the plaintiff had not conducted himself in such
way to be regarded as having waived or altered the defendant's position. The
defendant was perfectly entitled to require the plaintiff be sent for
re-examination after having studied the specialist medical report but the
defendant elected not to do so at its peril.

- E [35] In this respect of award of damages, I have in *Gunalan Chandakesan &
Anor v. Tamil Arasu Velu* [2014] 1 LNS 928 analysed the law and principles
that were laid down in a string of Federal Court cases. Nonetheless, it suffices
for me here to quote the following *dicta* of Gill FJ in *United Plywood and
Sawmill Ltd v. Lock Ngan Loi* [1970] 1 LNS 164; [1970] 2 MLJ 237 which
F by far is most often quoted and applied:

- G As has been said again and again, the assessment of damages in cases of
personal injury is one of the most difficult things for either a judge in the
first instance or a Court of Appeal. When a man has lost his arm there
is no sum in the world that can in the true sense compensate for it. Yet
compensation in the form of money is the only way in which he can be
granted redress for the injury he has suffered. It is neither possible nor
desirable for damages for the loss of an arm to be standardised or rigidly
classified, as no two cases are ever alike. But in order to maintain some
semblance of uniformity, the amounts awarded in past cases, which bear
H reasonable comparison with the case under review, should serve as a
useful guide. The general principle is that an appellate court can only
interfere with an assessment if it is considered so inordinately low or
inordinately high as to make the court exclaim, "Good gracious, is that
the sum which has been awarded - that sum must be altered", or if it is
so much out of line with the discernible trend or pattern of awards in
I reasonably comparable cases that it must be regarded as a wholly
erroneous estimate.

However, the award must not be punitive and still less a reward as held in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324. In other words, and as held by the Federal Court in *Yang Salbiah & Anor v. Jamil Harun* [1981] 1 LNS 106; [1981] 1 MLJ 292, the award of damages must be fair, adequate and not excessive.

[36] The good gracious test that emanated from the aforesaid case is the appropriate litmus test in respect of the quantum of the achilles tendon cut award under challenge here. By reason of having discarded the updated medical report, the learned Sessions Court Judge had obviously failed to consider the after treatment effects of the plaintiff's right foot especially in the medium and long term. In consequence, the amount of RM15,000 awarded is patently or 'good graciously' inadequate. The plaintiff referred to the case of *Adrian Yeoh Roslan & Ors v. Sin Hock Soon Transport Sdn Bhd & Anor* [2010] 2 PIR [53] wherein the court awarded the sum of RM35,000 for cut of extensor hallucis and digitorum tendon cut with limitation of movement in the left ankle and subtalar joint in the victim's left foot. The plaintiff here claimed for RM55,000 and an additional RM5,000 for muscle wasting as fair and reasonable compensation. The defendant replied that there should only be a single award because they were related to the same part of the body following *Seah Yit Chen v. Singapore Bus Service (1978) Ltd & Ors* [1990] 1 LNS 56; [1990] 3 MLJ 144.

[37] In my opinion after taking into account other consequential factors such as loss of sole sensation and muscle power as well as economic inflation, I find that the fair and reasonable award is RM45,000 lump sum. I am mindful that the plaintiff also claimed for physiotherapy sessions amounting to RM6,000. However, I find that this claim is special damages in nature and must be backed by receipts of the actual expenses incurred unless otherwise satisfactorily explained on why they were not produced. In their absence, this claim cannot therefore be allowed.

[38] Lastly, the plaintiff also argued that the learned Sessions Court Judge erroneously awarded only 1/3 of the RM8,500 medical expenses incurred by the plaintiff for treatment at the Penang Adventist Hospital. According to the defendant, the plaintiff was fully aware of the availability of orthopedic treatment in the governmental Penang Hospital but yet the plaintiff opted to be treated at the private Penang Adventist Hospital.

[39] In the Court of Appeal case of *Chai Yee Chong v. Lew Thai* [2004] 2 CLJ 321, Abdul Hamid Mohamad FCJ (later CJ) held as follows:

To summarise my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But, when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he

- A seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:
- (a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons;
- B or
- (b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or
- C
- (c) He must prove that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by RK Nathan JC in *Chong Chee Kong (supra)* with whom I agree, we are concerned with treatment, not accommodation.
- D

If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor (supra)* and by this court in *Hj Ariffin Hj Ismail (supra)* or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Kia Bak (supra)*. It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded.

E

F

Furthermore, Abdul Aziz Mohamad FCJ held as follows:

- The last thing that I have to say on this subject concerns my learned brother's opinion to the effect that if a plaintiff is justified in seeking treatment at a private hospital, as opposed to treatment at a government hospital, he must further prove the reasonableness, from the point of view of comparative charges of private hospitals, of the choice of the particular private hospital. In a genuine case where treatment at a private hospital, as opposed to treatment at a government hospital, is reasonable, it ought not to be too difficult for a plaintiff to prove it. It will be a matter of showing the relative circumstances prevailing in two sectors, the government hospital sector and the private hospital sector, and the needs of the plaintiff's condition. But I fear that to require the plaintiff to prove that the choice of the particular private hospital out of other private hospitals is reasonable in terms of charges in order for him to be able to claim in full the charges incurred at the particular private hospital may be placing on a plaintiff too heavy a burden of making a survey among private hospitals before making his choice in order to be able to claim the full expenses. It will have to be a choice, for example, of a private hospital
- G
- H
- I

that fulfils the needs of the case, but is not necessarily the cheapest, because the cheapest may, due to distance, not be convenient for the plaintiff. In a time of dire need such a survey may not be practical. In actual reality it may be that the matter is quite simple, but until I am myself acquainted with the reality I am chary of imposing such a burden on a plaintiff. Of course it may be shown that the particular private hospital has been chosen upon considerations that are not reasonable in view of its charges, but that is different from placing on the plaintiff the burden of proving that the choice is reasonable.

[40] At the trial, the plaintiff's mother stated she sent the plaintiff to Penang Adventist Hospital because it was the best option available and also the plaintiff needed medical examination done on him as soon as is possible. At that time, the Penang Adventist Hospital was easily accessible and the nearest hospital to the premises where the accident occurred.

[41] The learned Sessions Court Judge did not deal in his grounds of judgment as to why he considered that it was unreasonable for the plaintiff to have sought treatment at the Penang Adventist Hospital. In the circumstances that then prevailed where the plaintiff was bleeding profusely from a deep wound as well as considering the explanation given by his mother that it was urgent to get the plaintiff for treatment soonest, I am of the opinion that it was reasonable that the plaintiff was sent to the Penang Adventist Hospital. Consequently, I find and hold that the plaintiff ought to be fully reimbursed the medical expenses incurred. The learned Sessions Court Judge again fell into error here by awarding only a third of it and that justified appellate intervention as well.

Conclusion

[42] For the foregoing reasons, I hereby dismiss the second appeal. As for the first appeal, I hereby allow the first appeal by substituting the Sessions Court's award of general damages for achilles tendon cut of RM15,000 to RM45,000 and special damages for private medical costs of RM2,333 to RM8,000. For the avoidance of doubt, the other awards of the Sessions Court remain unaltered.

As to costs, the defendant shall pay the plaintiff RM4,000 and RM4,000 for the second appeal and the first appeal respectively.

A

B

C

D

E

F

G

H

I